Supreme Court, U.S.
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No. 03-139

IN THE

Supreme Court of the United States

LILIAN HERNANDEZ,

Petitioner,

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT and BOROUGH OF PALISADES PARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Respondents accept the Facts as set forth in the Opinion of the Third Circuit Court of Appeals (Pet. Writ at 2a) but objects to Petitioner's Statement of the Case for the reasons set forth herein.

Importantly, Petitioner fails to substantiate many facts alleged in her Statement of the Case. The Statement of the Case is replete with multiple references to "testimony" without giving any citation or reference to support the factual propositions made. For example petitioner states at page 5 of Petitioner's Writ: "Former Police Officer Anderson *testified* that if a police officer wanted something he could have it as long as he kept his mouth shut. Both he and Sgt. Shirley also *testified* that it was common knowledge around the police department that police officers were committing similar crimes for years." (Pet. Writ at 5 C) The Petitioner fails to provide the transcript citation for this alleged testimony. However, even if these factual statements are accepted as true they are merely rumors and would not rise to the level of information that necessarily reached the ears of the Chief of Police.

In addition, Petitioner's factual assertions with respect to percentages of minority residents are similarly made without any evidential support in the record. Petitioner has continued a pattern of asserting factual arguments without providing the evidential foundation contained in the record below.

REASONS FOR DENYING THE PETITION

There are three questions presented by the Petition: (1) whether a municipality can be held liable under § 1983 for a series of constitutional violations committed by officials who are not Policy-makers per se; (2) whether a municipality can be held liable under the deliberate indifference standard, if Policy-makers ignored obvious constitutional misconduct; and (3) whether under the facts and circumstances of this case municipal liability should attach to the Borough of Palisades, under policy, custom, and/or deliberate indifference to Hernandez's constitutional rights. The answer to each of the Petitioners question is clearly no.

The Petitioner claims that the Borough of Palisades Park and the Borough of Palisades Park Police Department are constitutionally responsible for the actions of a few rogue officers. Petitioner correctly argues that five officers conspired to commit the crime of burglary against Mrs. Hernandez. However, the Petitioner is incorrect in asserting that the officers attempted to deprive "minority individuals" and "minority owned businesses" of their property. As Justice Brooks points out in his opinion for the Third Circuit Court of Appeals, "the District Court appropriately concluded that although specific police officers did commit constitutional violations, ***appellant introduced no evidence suggesting that the Borough had an official policy or custom of committing such violations.*** (Own emphasis added)

I. THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAW AND THE BOROUGH OF PALISADES PARK CANNOT BE HELD RESPONSIBLE

Municipal entities are only responsible for the violations of its police officers to the extent that the injuries arose from its policies or customs. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-695 (1978). The burglaries alone are insufficient to create a nexus between the municipality and the rogue officers. The Petitioner has done nothing but speculate as to links between the officers and policymakers.

A. The individuals responsible for the burglaries are not policy makers and attributing liability to the Municipality is improper.

As pointed out by the appellant, and established by the Court it is undisputed that the Borough of Palisades Park Chief of Police was the relevant policymaker at the time of the incident. *See* N.J.S.A. 40A:14-118, which states in part that ". . . any ordinance, or rules, or regulations, shall provide that the chief of police, if such position is established, shall be the head of all the police force and shall be directly responsible authority for the efficiency and routine day to day operations thereof." Even more specifically, the Police Manual to which the Court of Appeals cites states that "command shall be exercised by the virtue of rank" and the Chief shall have "complete authority over all police personnel functions and operations" and "shall set the administrative policies of the department."

The Police Manual also established that even if a member of the department is placed in a command position, the officer is expressly subject to discretion from higher authority. Clearly, the Chief of Police was the non-delegable policymaker and none of the rogue officers had standing to set policy. The assertions of the Petitioner that Lt. Giantanno could somehow set policy for the department runs counter to the evidence presented below as well as the applicable statutes and regulations.

All the evidence adduced below established that the Chief of Police was not aware of the illegal activity. In fact, the District Court found that there was no evidence in the record to prove any kind of indifference to constitutional violations. The Petitioner simply failed to provide any evidence that the municipality was aware information it was gathering was being used to commit burglaries. In fact, when the police department became aware of a potential problem, the Department turned over all of their files to the Bergen County Prosecutors Office for review.

B. Not only did municipal policymakers not act with deliberate indifference, but there was not obvious constitutional misconduct

Contrary of the assertions of the petitioner, no evidence was produced below which would demonstrate that policymakers ignored obvious constitutional misconduct. The petitioner's argument boils down to the fact that since there was rash of burglaries in Palisades Park, the policymakers should have known about possible constitutional violations. However, the mere existence and happenstance of burglaries is not in and of itself an indication of constitutional violations.

Regrettably, the burglaries of homes are not a rare occurrence, and it certainly would not alert the relevant policymakers to the possibility of constitutional violations. There was no evidence to suggest that the Chief of Police was aware that the police were involved in any wrongdoing. Moreover, as stated above, when the allegations of impropriety were alleged, the Chief of Police cooperated fully with the Bergen County Prosecutors Office.

The petitioner continues to assert that Lt. Giannantonio had the ability to set municipal policy. However, the Third Circuit clearly disposed of this argument by stating that the petitioner "introduced no evidence to suggest that Giannantonio was the commanding officer at the time of the robberies or that the Commanding Officer had final authority to set municipal policy". (Pet. Writ at 6a)

C. The Borough of Palisades Park did not have a custom or policy of violating the Petitioners constitutional rights.

The petitioner repeatedly cites to the officers who were charged and arrested for the crimes, however, petitioner is unable to cite to a policymaker who would confirm a policy or custom of violating constitutional rights stemming from the burglary of the petitioner's home. The petitioner sites a "pervasive mindset", which is a far cry from a policy or custom. The Third Circuit bluntly states "the appellant (petitioner) introduced no evidence suggesting that the Borough had an official policy or custom of committing such violations." (Pet. Writ at 5a)

As stated above, the Police of Chief was the relevant policymaker and the petitioner produced no evidence that would suggest to the fact-finder that an official proclamation or decision was made to set a policy of constitutional violations.

Similarly, the petitioner cannot point to a custom. The policymaker clearly did not have notice that a constitutional violation was likely to occur. Moreover, it is highly dubious that the police department would have a custom of burglarizing people's homes, and the custom would be so permanent and widespread as to have the force of law. It cannot be highly probable that police officers, who are sworn to uphold the law, would violate that mandate at every opportunity. The Chief of Police did not turn a "blind eye" to the officers' illegal conduct because he had no reason to know or suspect of the conduct. *The officers who were committing the crimes were hiding this fact, and the mere existence of burglaries cannot give rise to even constructive knowledge that the burglaries were taking place.* (Emphasis added) In her petition, the petitioner even catalogues the efforts the rogue officers went through to conceal their crimes, even falsifying records. (Pet. Writ at 10-11)

This case simply does not rise to the level of a municipal governmental constitutional violation. Clearly, the relevant policymaker had no actual knowledge of the violations. Furthermore, the deliberate efforts of rogue officers to conceal their illegal conduct demonstrates how unlikely it would be for the Borough of Palisades Park to have known about their criminality.

II. THE THIRD CIRCUIT'S RULINGS DO NOT DIRECTLY CONFLICT WITH OTHER CIRCUIT RULINGS AND THE DECISION DOES NOT CREATE A CLEAR AND IRRECONCILABLE CONFLICT WITH OTHER CIRCUITS

The petitioner cites several cases which, for reasons enunciated below, do not conflict with opinions of other circuits concerning policies, customs, or deliberate indifference of municipal entities.

In *Randall v. Prince George's County*, 302 F.3d 188 (4th Cir. 2002), the Plaintiff's contention in that matter was that the County maintained an unofficial policy of detaining persons against their will in the absence of probable cause. The court held that municipal liability can only be held for liable for a "widespread practice" but only if its continued existence can be laid to the fault of municipal policymakers, and a sufficient causal connection between the `municipal custom and usage' and the specific violation can then be established when and if: (1) the municipality must have "actual or constructive knowledge" of the custom and usage by its responsible policymakers; and (2) there must be a failure by those policymakers, "as a matter of specific intent or deliberate indifference," to correct or terminate the improper custom and usage. In the case at bar, the relevant policy maker had no actual or constructive knowledge, and there clearly was no deliberate intent to allow the alleged "custom" of burglarizing homes to exist.

In *Cozzo v. Tangipahoa Parish Council*, 262 F.3d 501 (5th Cir. 2001), the case merely restates principles of law enunciated in Third Circuit opinions. It is of no great moment when the petitioner reiterates that liability can attach if a

policy, although not authorized, "is so common and well settled as to constitute a custom that fairly represents the entity's policy." In fact, in *Cozzo*, the court found (much like the case at bar) that the official policy maker did not in fact delegate authority to underlings. This case is on point with *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), where the court held that the defendant city "acquiesced in a custom tolerating the tacit use of excessive force." This case simply does not conflict with the Third Circuit rulings because the issues have been similarly heard and decided.

The Petitioners reliance on *Billings v. Madison Metropolitan School District*, 259 F.3d 807 (7th Cir. 2001) is equally unpersuasive. The petitioner cites the case for the proposition that to establish a municipality has violated an individuals rights, they must prove one of the following: (1) that the city had an express policy that, when enforced, causes a constitutional deprivation; (2) that the city had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage within the force of law; or (3) that the plaintiff's constitutional injury was caused by a person with final policy-making authority. These were all factors examined by the district court as well as the Third Circuit Court of Appeals. It can hardly be stated that the Petitioner is asking the Court to examine a unique split in the law when different Circuits are utilizing similar factors.

The Petitioner looks to the Ninth, Tenth, and Eleventh Circuits to establish some sort of inconsistency between the Circuits. Her argument is unpersuasive. In sum, the case law looks to factors similar to those utilized by the Third Circuit. No matter what Circuit's case law is discussed, it is still necessary for the petitioner to establish a nexus between the

alleged custom or policy and the relevant law policymaker. As stated in *Cuesta v. School Board of Miami*, 285 F.3d 962 (11th Cir. 2002), a local government body can be held liable, if it can be said to represent official policy. In fact, all of the cases cited throughout the Circuits are consistent with *Bryan County Commissioners v. Brown*, 520 U.S. 397 (1997), where notice is generally established through a pattern of known constitutional violations. In the case at bar, there are clearly no known patterns of constitutional violations.

The Petitioner states that the lower Court in Hernandez held that a municipality will not be held liable if the unconstitutional conduct committed by Officers other than policymakers. This is clearly a misreading of the District Court and Appellate Court's holdings. Liability can attach to a municipality if the conduct was committed by officers other than policymakers, ***but only if it can be linked to a custom or official policy***. As we have seen, this ruling is clearly consistent with the holdings of other Circuits. There is clearly some measure of uniformity among the Circuits. Despite the assertions of the Petitioner, this case would have been decided the same way no matter where the case was heard. *The Petitioner's failure to produce evidence of a custom or a policy is a fatal flaw in her case and renders the pending Petition for Writ of Certiorari without any foundation. (Emphasis added)*

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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